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HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 144

POND CREEK POCAHONTAS COMPANY AND NATIONAL MINE SERVICE COMPANY,

Appellants,

vs.

ARCH J. ALEXANDER, INDIVIDUALLY AND AS CHIEF OF THE DEPARTMENT OF MINES OF THE STATE OF WEST VIRGINIA, ET AL.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

STATEMENT AS TO JURISDICTION

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INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinions below	2
Date of judgment and application for appeal	2
Nature of case	2
Raising the federal question	3
Statute of the State involved	7
Statutory provision sustaining jurisdiction	8
Questions presented	8
Statement of the case	9
The questions are substantial	12
Appendix "A"—Opinion of the Circuit Court of Kanawha County of June 28, 1952	20
Appendix "B"—Opinion of the Circuit Court of Kanawha County of July 9, 1952	21
Appendix "C"—Opinion of the Supreme Court of Appeals of West Virginia	22

Table of Cases Cited

Adams v. *Tanner*, 244 U.S. 590	16
Fairmont Creamery Co. v. *Minnesota*, 274 U.S. 1	16
Hartford Steam Boiler Inspection and Insurance Co., et al. v. *Harrison*, 301 U.S. 459	17
House v. Mayes, 219 U.S. 270	16
Liggett Co. v. *Baldridge*, 278 U.S. 105	16
Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U.S. 249	8
Nashville, Chattanooga & St. Louis Railway v. *Walters*, 294 U.S. 405	14
Pond Creek Pochontas Co. v. *Alexander*, 74 S.E. (2d) 590	2
Railway Mail Association v. *Corsi*, 326 U.S. 88	8
Weaver v. *Palmer Brothers Co.*, 270 U.S. 402	16
United States v. *Carolene Products Co.*, 304 U.S. 144	14
Yu Cong Eng v. *Trinidad*, 271 U.S. 500	16

Statutes Cited

	Page
Acts of the Legislature of West Virginia, Regular Session, 1915, Chapter 10, Section 18, reenacted by Chapter 88, Section 13(h), Acts of the Legislature, Regular Session 1925, and incorporated in the Official Code of 1931 in Chapter 22, Article 2, Section 10 (Acts of the Legislature, Regular Session 1915, page 92)	8
Constitution of the United States, 14th Amendment,	8, 12, 18
Constitution of West Virginia, Article 3, Section 10	3

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 10537

POND CREEK POCAHONTAS COMPANY, A CORPORATION, AND NATIONAL MINE SERVICE COMPANY, A CORPORATION, PLAINTIFFS BELOW,

Appellants,

vs.

ARCH J. ALEXANDER, INDIVIDUALLY AND AS CHIEF OF THE DEPARTMENT OF MINES OF THE STATE OF WEST VIRGINIA, JOSEPH J. BIERER, ACTING CHIEF OF SAID DEPARTMENT OF MINES, E. L. CHATFIELD, INSPECTOR AT LARGE OF SAID DEPARTMENT, AND ELMER FARMER, MINE INSPECTOR OF SAID DEPARTMENT, DEFENDANTS BELOW,

Appellees.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment and decree of the Supreme Court of Appeals of West Virginia entered in this cause.

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Opinions Below

A copy of the unreported opinion and decree of the Circuit Court of Kanawha County, West Virginia, sustaining appellees' demurrer to appellants' petition for declaratory judgment is attached hereto as APPENDIX "A".

A copy of the unreported opinion and decree of the Circuit Court of Kanawha County, West Virginia, sustaining appellees' demurrer to appellants' amended petition for declaratory judgment and dismissing the cause is attached hereto as APPENDIX "B".

The opinion of the Supreme Court of Appeals of West Virginia on appeal is reported in ——— W. Va., ———, 74 S. E. 2d, 590. A copy of the opinion and final judgment and decree of the Supreme Court of Appeals of West Virginia is attached hereto as APPENDIX "C".

Date of Judgment and Application for Appeal

The final judgment and decree of the Supreme Court of Appeals of West Virginia was entered on March 3, 1953. The application for appeal is presented to the Chief Justice of the Supreme Court of the United States herewith to-wit, on May 27, 1953.

Nature of Case

The Department of Mines of West Virginia refused to approve a diesel mine locomotive, fueled by a product of petroleum, for use in appellant Pond Creek Pocahontas Company's Mine solely on the basis that a Statute of West Virginia prohibited the approval.

This suit is a declaratory judgment proceeding to secure a judgment that a statute of West Virginia does not prohibit the use underground of a diesel mine locomotive, fueled by a product of petroleum, or if it does prohibit such

use of the diesel mine locomotive, so fueled, that the statute is invalid because it deprives appellants of their property without due process of law and denies them the equal protection of the laws in contravention of the Fourteenth Amendment to the Constitution of the United States and Section 10 of Article 3 of the Constitution of West Virginia. The Circuit Court of Kanawha County, West Virginia, and the Supreme Court of Appeals of West Virginia, on appeal, dismissed the cause on demurrer, holding that the statute prohibits the use of the diesel mine locomotive, fueled by a product of petroleum, and is a valid exercise of the police power.

Raising the Federal Question

Appellants first raised the federal questions involved in their petition for declaratory judgment filed in the Circuit Court of Kanawha County, West Virginia, paragraph 9 of which reads in part as follows:

> "9. Plaintiffs aver and charge that the threatened action of the defendant and his forbidding of the Coal Company to use and operate said diesel powered locomotive, and others similar thereto, underground, when fueled by a product of petroleum are unlawful because:
>
> * * * * *
>
> (d) In the event that Code 22-2-10 should properly be construed as an absolute and unconditional prohibition of the use of a product of petroleum as a motive power in a mine, notwithstanding the fact that the use of a product of petroleum as fuel for the aforesaid locomotive and for others similar thereto, when operated underground in any mine in conformity with the provisions of said Schedule 22 and of said Approval No. 2201, will not contaminate the air in such manner as to be injurious to the health of any miner working in said mine, and will not otherwise render such mine unsafe, then said statute is arbitrary and confiscatory

and unreasonable and deprives the plaintiffs of their properties without due process of law and denies the plaintiffs equal protection of the laws contrary to Section 10 of Article 3 of the Constitution of West Virginia and to the Fourteenth Amendment to the Constitution of the United States."

The prayer for relief requested an order declaring the statute invalid, as applied to appellants, if an absolute prohibition.

The decree of the lower court sustained a demurrer to the petition for declaratory judgment but permitted appellants to amend their petition. (APPENDIX "A").

The amended petition for declaratory judgment again presented the question in paragraph 10, which reads in part:

"10. Plaintiffs aver and charge that the threatened action of the defendants and their forbidding of the Coal Company to use and operate said diesel powered locomotive, and others similar thereto, underground, when fueled by a product of petroleum are unlawful because

* * * * *

(d) In the event that Code 22-2-10 should properly be construed as an absolute and unconditional prohibition of the use of a product of petroleum as a motive power in a mine, notwithstanding the fact that the use of a product of petroleum as fuel for the aforesaid locomotive and for others similar thereto, when operated underground in any mine in conformity with the provisions of said Schedule 22 and of said Approval No. 2201, will not contaminate the air in such manner as to be injurious to the health of any miner working in said mine, and will not otherwise render such mine unsafe, then said statute is arbitrary and confiscatory and unreasonable and deprives the plaintiffs of their

properties without due process of law and denies the plaintiffs equal protection of the laws contrary to Section 10 of Article 3 of the Constitution of West Virginia and to the Fourteenth Amendment to the Constitution of the United States in that said statute discriminates against products of petroleum and alcohol and in favor of other fuels producing on combustion the same gases when there is no reasonable basis therefor, and said statute discriminates against products of petroleum and alcohol and in favor of electricity and other means of locomotion which are equally dangerous when improperly used when there is no reasonable basis therefor."

The prayer for relief stated, in part:

"* * * and that this Court may make and enter a judgment declaring the rights of the parties hereto in the premises, and more particularly declaring that Section 10 of Article 2 of Chapter 22 of the Code of West Virginia of 1931, as amended, does not prohibit the use of said locomotive, and others similar thereto, in the underground coal mines of the Coal Company when fueled by a product of petroleum, where the inspector is of the opinion that such use will not contaminate the air to such an extent as to be injurious to the health of the miner and is otherwise safe, or that, insofar as said statute prohibits absolutely and unconditionally the use of products of petroleum as fuel for such locomotives in plaintiff's mines, and in other underground coal mines in West Virginia under conditions where such use is safe and reasonable, the same deprives the plaintiffs of their property without due process of law and denies the plaintiffs equal protection of the laws and is therefore illegal and void in contravention of Section 10 of Article 3 of the Constitution of West Virginia and of the Fourteenth Amendment to the Constitution of the United States."

Appellees demurred to the amended petition and the lower court in dismissing the cause entered the following decree (APPENDIX "B"):

> "And the plaintiffs not having further pleaded herein and having declined to plead further, the Court is of the opinion and does hereby adjudge, order, decree and declare that:
>
> 1. The use of diesel locomotives fueled by a product of petroleum as motive power in any coal mine in the State of West Virginia is absolutely and unconditionally prohibited by Section 18, Chapter 10, Acts of the Legislature of West Virginia, Regular Session 1915; and further under said statute mine inspectors of the Department of Mines of the State of West Virginia have no authority whatever to determine whether the use of said diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this state will contaminate the air to such an extent as to be injurious to the health of miners working therein.
>
> 2. The absolute and unconditional prohibition of the use of diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this state is a reasonable exercise of the police power of the State of West Virginia which does not contravene the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Section 10, Article III of the Constitution of the State of West Virginia.
>
> 3. All matters herein having been adjudicated this cause is dismissed from the docket."

Appellants appealed to the Supreme Court of Appeals of West Virginia, and in their petition for appeal assigned, inter alia, the following error:

> "Third: The Court erred in decreeing and declaring that said statute, as an absolute and unconditional prohibition of the use of diesel locomotives fueled by a

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product of petroleum as motive power in any coal mine in this state, is a reasonable exercise of the police power of the State of West Virginia which does not contravene the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Section 10 of Article III of the Constitution of the State of West Virginia."

The decision and opinion of the Supreme Court of Appeals of West Virginia states (APPENDIX "C", p. ii):

"7. Code, 22-2-10, is clear and unambiguous, and should be applied so as to prohibit the use of petroleum as motive power in the underground mines of this State.

8. Code, 22-2-10, was enacted in the valid exercise of the police power of the State, which is inherent in the States of the Union, and was enacted with the evident purpose of protecting the health and safety of those engaged in mining in the underground mines of this State.

9. Code, 22-2-10, which prohibits the use of products of petroleum as motive power in underground mines in this State is not violative of the Fourteenth Amendment to the Constitution of the United States or the due process clause contained in Article III, Section 10, West Virginia Constitution."

and at page 9 of APPENDIX "C":

"The decree of the Circuit Court of Kanawha County is affirmed."

Statute of the State Involved

The statute of the State of West Virginia, the validity of which is involved, is Chapter 10, Section 18, Acts of the Legislature, Regular Session, 1915, reenacted by Chapter 88, Section 13(h), Acts of the Legislature, Regular Session, 1925, and incorporated in the Official Code of 1931 in Chap-

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ter 22, Article 2, Section 10 (Acts of the Legislature, Regular Session 1915, page 92) which provides as follows:

> "No product of petroleum, or alcohol, or any compound that in the opinion of the inspector will contaminate the air to such an extent as to be injurious to the health of the miner shall be used as motive power in any mine."

This statutory provision will be referred to hereafter as Code 22-2-10.

The Supreme Court of Appeals of West Virginia decided in the present cause that the above provision absolutely prohibits the use of a product of petroleum for motive power in the underground mines of the state.

Statutory Provision Sustaining Jurisdiction

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 1257(2) of Title 28 of the United States Code.

Cases Believed to Sustain Jurisdiction

Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U. S. 249 (1933).

Railway Mail Association v. *Corsi*, 326 U. S. 88 (1945).

Questions Presented

Where a statute intended to promote safety has been construed as absolutely prohibiting the underground use of diesel mine locomotives, when fueled by a product of petroleum, and where the admitted facts establish that such locomotives so fueled are absolutely safe for underground use, is there a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

Where a statute intended to promote safety has been construed as absolutely prohibiting the underground use

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of diesel mine locomotives, when fueled by a product of petroleum, and where the admitted facts establish that regulation rather than prohibition will suffice, is there a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

Where the validity of a statute prohibiting the underground use of diesel mine locomotives, fueled with a product of petroleum, was upheld because it was valid when enacted in 1915 and reenacted in 1925, and where the admitted facts establish that the basic conditions on which it was predicated have changed, is there a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States?

Where a statute has been construed as absolutely prohibiting the underground use of diesel mine locomotives, when fueled by a product of petroleum, and where the use of other fuels as motive power underground is not prohibited despite the fact that such fuels are identical with products of petroleum in chemical content and in the results of their use, and where products of petroleum may be used in steam locomotives, and where other equipment which is no safer than such locomotives is not prohibited, is there a denial of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

The facts summarized below are pleaded in the amended petition for declaratory judgment and admitted by the demurrer:

Pond Creek Pocahontas Company operates coal mines in West Virginia and elsewhere. National Mine Service

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Company manufactures and sells mining machinery in West Virginia and elsewhere. Arch J. Alexander was, prior to May 11, 1952, the Chief of the Department of Mines Of West Virginia, and since that date Joseph J. Bierer has been the Acting Chief of the Department. E. L. Chatfield and Elmer Farmer are inspectors of the Department having jurisdiction over Pond Creek Pocahontas Company mines.

Subsequent to the enactment of Code 22-2-10, diesel mine locomotives were developed for use in underground mines and came to be used in various foreign countries. In keeping with its practice of attempting to make coal mining safe and efficient, the Bureau of Mines of the United States Department of the Interior investigated the use of diesel mine locomotives, and on September 2, 1944, established and prescribed safety standards for their construction and use underground. The standards prescribed are no more detailed or restrictive than those prescribed for other machinery and equipment used in mines in West Virginia. These standards prescribed by the United States Bureau of Mines contain a safety factor making them much more stringent than is necessary for absolute safety. Any diesel mine locomotive complying with those standards would not be hazardous, but could be operated with complete safety, and when fueled with a product of petroleum, would not contaminate the air in a coal mine to such an extent as to be injurious to the health of any miner.

During the years 1948 through 1950, the National Mine Service Company, at the request of Pond Creek Pocahontas Company, designed, perfected and manufactured a diesel mine locomotive for use in the latter's mines. The Bureau of Mines inspected and tested the locomotive and on May 8, 1951, after determining that it fully complied with its standards, approved it for use underground. On May 24,

1951 the locomotive was sold to Pond Creek Pocahontas Company for $22,000.00 for use underground in its mines in West Virginia. The only practical fuel for use in the locomotive is a product of petroleum.

On October 30, 1951, the appellee Alexander and various inspectors and experts of the West Virginia Department of Mines, together with representatives of the United States Bureau of Mines, tested the locomotive with respect to the safety of using it underground. By letter dated January 8, 1952, appellee Alexander advised that although the locomotive was completely safe for use underground in the mine of Pond Creek Pocahontas Company, when fueled by a product of petroleum, and would not contaminate the air to such an extent as to be injurious to the health of a miner, he nevertheless would not approve its use because of an opinion of the Attorney General of West Virginia that Code 22-2-10 absolutely prohibited the use of a product of petroleum as motive power. The said letter advised Pond Creek Pocahontas Company that any attempt to use the locomotive, so powered, would result in the closure of the mine and the institution of criminal proceedings, and that the use of any similar locomotive, so powered, would also cause the closure of any mine in which used and the institution of criminal proceedings against the coal operator.

Petroleum products and alcohol are not the only fuel capable of use in internal combustion engines and locomotives, but fuels derived from wood, natural gas and coal could be used. These other fuels have the same principal chemical elements as do products of petroleum, and upon combustion produce the same exhaust gases. The use of fuels other than products of petroleum and alcohol as motive power are not prohibited by West Virginia law. In addition, products of petroleum and alcohol can be used in steam locomotives underground.

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Shortly after the refusal of the Department of Mines to approve the use of the locomotive when powered by a product of petroleum, appellants filed first a petition for declaratory judgment and later an amended petition for declaratory judgment. In both it requested (a) a judgment declaring that Code 22-2-10 does not prohibit the use of the locomotive, or others similar to it, when so powered, or, if the statute be held to prohibit such use, (b) a judgment declaring that the statute deprives appellants of their property without due process of law and denies them the equal protection of the laws, and is, therefore, illegal and invalid in contravention of Section 10 of Article 3 of the Constitution of West Virginia and the Fourteenth Amendment to the Constitution of the United States.

The procedural steps, court decisions and judgments and decrees, summarized under the heading Raising Questions of Jurisdiction, have culminated in the judgment and decree of the Supreme Court of Appeals of West Virginia that Code 22-2-10 does absolutely prohibit the use of the locomotive when fueled by a product of petroleum (regardless of its safety), that such prohibition is a valid exercise of the police power, and that the statute offends neither the Constitution of West Virginia nor the Fourteenth Amendment to the Constitution of the United States.

The Questions Are Substantial

Due Process:

Appellants have, at every step, attacked the validity of Code 22-2-10 as construed by the Supreme Court of Appeals of West Virginia as being arbitrary and completely unreasonable in its application to the facts in this cause and, therefore, violative of due process. The substantiality of this question is best pointed up by certain language in the

decision appealed from (——— W. Va. ———, 74 S. E. 2d at 595, page 7 of Appendix C):

> "Section 10 was originally incorporated into the statutory law of this State by Chapter 10, Section 18, Acts of the Legislature, 1915; later in 1925 it was reenacted by Chapter 88, Section 13 (h), Acts of the Legislature, 1925; and still later in 1931 Section 10, as it was originally drafted, was incorporated into the Official Code of 1931, in Chapter 22, Article 2, Section 10. This record clearly discloses that, at the times Section 10 was enacted and reenacted, diesel locomotives had not reached the high state of development and did not have the qualities of safety for haulage in underground mines suggested by the petitioners. * * *."

and again (——— W. Va. ———, 74 S. E. 2d at 595, page 8 of Appendix C):

> "* * * Section 10, in our opinion is a valid exercise of the police power, which is inherent in the States of the Union. It was enacted with the evident purpose of protecting the health and safety of those engaged in mining in underground mines in this State. The legislative fiat contained in Section 10 is, in our opinion, not arbitrary and unreasonable, in the light of the circumstances prevailing at the times it was originally enacted and later reenacted."

The pleaded facts, admitted by the demurrer, are that appellants' diesel locomotive (when fueled by a product of petroleum) as well as all others (so fueled) complying with the Bureau of Mines standards, are absolutely safe. They are not inherently dangerous. As the quoted language indicates, by reason of technological development, such locomotives, so fueled, have, since the enactment and reenactment of the statute, reached a high state of development. Those facts are essential to the determination of reasonableness and of due process; they establish the unreason-

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ableness of the application of Code 22-2-10 in this case and its consequent invalidity herein. In *Nashville, Chattanooga & St. Louis Railway* v. *Walters*, 294 U. S. 405 (1935), the Court said at pages 414, 415:

> "The Supreme Court declined to consider the special facts relied upon as showing that the order, and the statute as applied, were arbitrary and unreasonable; and did not pass upon the question whether the evidence sustained those findings. It held that the statute was, upon its face, constitutional; that when it was passed the State had, in the exercise of its police power, authority to impose upon railroads one-half of the cost of eliminating existing or future grade crossings; and that the Court could not 'any more' consider 'whether the provisions of the act in question have been rendered burdensome or unreasonable by changed economic and transportation conditions,' than it 'could consider changed mental attitudes to determine the constitutionality and enforceability of a statute'. A rule to the contrary is settled by the decisions of this Court. A statute valid as to one set of facts may be invalid as to another. A statute valid when enacted may become invalid by change in the conditions to which it is applied. The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably. To this limitation, attention was specifically called in cases which have applied most broadly the power to impose upon railroads the cost of separation of grades. * * *."

In *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938), the Court pointed out at pages 153, 154:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 79 L. ed. 281, 55 S. Ct. 187, and the constitutionality of a statute predicated upon the existence of a par-

ticular state of facts may be challenged by showing to the court that those facts have ceased to exist. *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 68 L. ed. 841, 44 S. Ct. 405. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. *Railroad Retirement Bd.* v. *Alton R. Co.*, 295 U. S. 330, 349, 351, 352, 79 L. ed. 1468, 1476, 1477, 55 S. Ct. 758; see *Whitney* v. *California*, 274 U. S. 357, 379, 71 L. ed. 1095, 1107, 47 S. Ct. 641; cf. *Morf* v. *Bingaman*, 298 U. S. 407, 413, 80 L. ed. 1245, 1250, 56 S. Ct. 756, though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class. * * *"

The facts conclusively demonstrate that the conditions to which Code 22-2-10 are applied have completely changed; the facts demonstrate that Code 22-2-10 as applied to appellants' diesel mine locomotive when fueled by a product of petroleum, as every other one approved by the Bureau of Mines, is without support in reason because the articles, being safe, are beyond the reason for the prohibition. There is no desire here to substitute the opinion of the United States Bureau of Mines for that of the Legislature of West Virginia. The United States Bureau of Mines merely recognizes, by its approval, an accomplished fact—i.e., that the Legislature in passing the statute acted long before the accomplishment of the fact. The Chief of the Department of Mines, the Acting Chief and the inspectors have also recognized the accomplished fact of complete safety in the use and operation of diesel mine locomotives when fueled by a product of petroleum.

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Another basic principle applicable here is that where regulation will suffice, prohibition is invalid. *Weaver* v. *Palmer Brothers Company*, 270 U. S. 402 (1926); *Liggett Co.* v. *Baldrige*, 278 U. S. 105 (1928); *Fairmont Creamery Company* v. *Minnesota*, 274 U. S. 1 (1927); *Adams* v. *Tanner*, 244 U. S. 590 (1917); *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500 (1926); *House* v. *Mayes*, 219 U. S. 270 (1911). Under the facts here, prohibition of use is entirely unnecessary; complete safety can be achieved by adherence to certain specifications. Moreover, the fact that the mining industry in West Virginia is regulated in innumerable ways, the fact that the administration of regulations by a staff of skilled and competent inspectors has been carried out for years, the fact that the regulations applicable to these locomotives in question are no more onerous than those now existing with respect to other equipment which is not prohibited, the fact that the use of instrumentalities fraught with danger when improperly used is merely regulated, all point up the reasonableness of regulation of diesel mine locomotives fueled by a product of petroleum, and the unreasonableness of their prohibition. Prohibition of the use of diesel locomotives fueled by a product of petroleum underground goes so far beyond the necessities for insuring the safety of the miners that it no longer has any reasonable relation to a legitimate legislative purpose. In so doing, as pleaded by appellants, and admitted by demurrer, it prevents the most efficient and economical mining and will result in the loss of many thousand dollars a year in even one mine alone.

Equal Protection of the Laws:

Code 22-2-10 absolutely prohibits the use of products of petroleum or alcohol as motive power and thus prohibits the use of machines using such products. However, it does

not prohibit the use of other compounds as motive power, but entrusts inspectors with discretion to determine whether or not their use will contaminate the air to such an extent as to be injurious to the health of the miner. If it does not so contaminate the air, they can be used. The Department of Mines, its Chief, its Acting Chief and its inspectors have found that the appellants' diesel locomotive, when fueled by a product of petroleum, is completely safe, but that merely because it is fueled by a product of petroleum, they are constrained by Code 22-2-10 to hold that its use is absolutely prohibited. If it were fueled with a product of coal or other substance, it could be used.

As the pleaded facts prove, fuels used in internal combustion engines have the same basic chemical content whether they be products of petroleum, alcohol, coal or other compounds. Their operations results in exactly the same exhaust gases. In short, the problems created would be exactly the same.

Equal protection of the laws under the Fourteenth Amendment does not forbid classification, but it does require that the classification be reasonable, that it rest on a difference which bears some reasonable and just relation to the act in respect to which the classification is proposed, that it not offend the plain standards of common sense. *Hartford Steam Boiler Inspection & Insurance Company, et al,* v. *Harrison,* 301 U. S. 459 (1937).

Any classification distinguishing between products of petroleum and alcohol, and "other compounds" rests on a difference of form not substance, on an accident of origin, not on physical difference. Insofar as safety and health of miners are concerned, all create the same problem, if there is any. Because they are identical insofar as this problem is concerned, the plain dictate of common sense is

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that they be treated similarly. They are not so treated by Code 22-2-10.

Diesel mine locomotives fueled by a product of petroleum are also subject to other discrimination lacking any basis of fact. As pleaded in the amended petition for declaratory judgment, steam locomotives may be used underground, regardless of the fuel used. Presumably, petroleum or a product thereof could be used in such locomotives to generate heat. The same safety problem is presented, but steam locomotives are not absolutely prohibited. Similarly, although the use of electric locomotives is highly dangerous, their use is not prohibited, merely regulated. The overriding end of safety has been met by regulation of many types of equipment, but a safe diesel mine locomotive, fueled by a product of petroleum, is absolutely prohibited.

It is submitted that the above facts clearly establish that Code 22-2-10 denies to appellants the equal protection of the laws guaranteed by the Fourteenth Amendment.

The question of constitutionality of Code 22-2-10 is not only of great importance to appellants in this particular instance, but is of importance to the entire mining industry of the leading coal mining state of the nation, and to the entire public which, directly and indirectly, is concerned with the efficient production and use of coal in home and industry. As has been pleaded, the use of diesel mine locomotives, fueled by a product of petroleum, would result in more economical operations and substantial savings of money; their prohibition results in useless expense and loss of operating efficiency. The loss in only one of the Pond Creek Pocohontas Company's mines is many thousands of dollars a year. National Mine Service Company is denied a large market in West Virginia for locomotives developed at great expense and the loss of profit of many thousands of dollars per year incident thereto. Thus,

at great loss to all concerned, including the public, Code 22-2-10 prevents the utilization of modern mining machinery which would be of utility throughout the coal fields of the state.

Conclusion

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

Don Rose,
Harold R. Schmidt,
John L. Laubach, Jr.,
Rose, Rose and Houston,
Charles F. Bagley,
Campbell, McNeer & Woods,
Counsel for Appellants.

Dated: May 26, 1953

APPENDIX "A"

(And at another day, to-wit: At a Circuit Court for Kanawha County, held at the Court House thereof on the 28th day of June, 1952)

On a former day, to-wit, May 23, 1952, this cause came on to be further heard upon all the pleadings and papers filed herein, the briefs of counsel, and argument of counsel upon the matters of law arising upon the defendants' demurrer to the petition herein; upon consideration of all which the Court is of opinion to and does hereby sustain said demurrer, to which action of the Court in sustaining defendants' demurrer the plaintiffs duly objected and excepted.

And the plaintiffs, not having further pleaded herein, the Court is of opinion to and does hereby Adjudge, Order, Decree and Declare that:

1. The use of Diesel locomotives fueled by a product of petroleum as motive power in any coal mine in the State of West Virginia is absolutely and unconditionally prohibited by Section 18, Chapter 10, Acts of the Legislature of West Virginia, Regular Session, 1915; and further under said statute mine inspectors of the Department of Mines of the State of West Virginia have no authority whatever to determine if the use of said type locomotive as motive power in any coal mine in this State will contaminate the air to such an extent as to be injurious to the health of miners working therein.

2. The absolute and unconditional prohibition of the use of Diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this state is a reasonable exercise of the police power of the State of West Virginia which does not contravene the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Section 10, Article III of the Constitution of the State of West Virginia.

3. And the plaintiffs are given leave to amend their petition herein as they may be advised.

The plaintiffs, by counsel, duly objected and excepted to the foregoing ruling of the Court.

APPENDIX "B"

(And at another day, to-wit: At a Circuit Court for Kanawha County, held at the Court House thereof on the 9th day of July, 1952.)

This day came the plaintiffs by counsel and tendered for filing their amended petition for declaratory judgment, and the same is ordered filed. Thereupon came the defendants by counsel and demurred to said amended petition upon the grounds heretofore urged in support of their demurrer to the original petition; upon consideration of all of which the Court is of opinion to and does hereby sustain said demurrer to said amended petition, to which action of the Court in sustaining defendants' demurrer, the plaintiffs duly objected and excepted.

And the plaintiffs not having further pleaded herein and having declined to plead further, the Court is of the opinion and does hereby adjudge, order, decree and declare that:

1. The use of diesel locomotives fueled by a product of petroleum as motive power in any coal mine in the State of West Virginia is absolutely and unconditionally prohibited by Section 18 Chapter 10, Acts of the Legislature of West Virginia, Regular Session 1915; and further under said statute mine inspectors of the Department of Mines of the State of West Virginia have no authority whatever to determine whether the use of said diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this state will contaminate the air to such an extent as to be injurious to the health of miners working therein.

2. The absolute and unconditional prohibition of the use of diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this state is a reasonable exercise of the police power of the State of West Virginia which does not contravene the due process and the equal protection clauses of the Fourteenth Amendment to the United States Constitution and Section 10 Article III of the Constitution of the State of West Virginia.

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3. All matters herein having been adjudicated this cause is dismissed from the docket.

The plaintiffs by counsel duly objected and excepted to the foregoing ruling of the court.

APPENDIX "C"

No. 10537

POND CREEK POCAHONTAS COMPANY, ET AL.

v.

ARCH J. ALEXANDER, CHIEF OF THE DEPARTMENT OF MINES, ETC., ET AL.

Kanawha County — Affirmed

RILEY, *Judge.*

1. The basic and cardinal principle, governing the interpretation and application of a statute, is that the Court should ascertain the intent of the Legislature at the time the statute was enacted, and in the light of the circumstances prevailing at the time of the enactment.

2. Where the meaning of a statute is clear and its provisions are unambiguous, this Court will not undertake to construe and interpret it, but will apply the statute as its exact terms require.

3. In ascertaining the legislative intent in the enactment of a statute, its terms should not be literally applied so as to thwart the evident intent of the Legislature.

4. In ascertaining the intent of the Legislature in the enactment of a statute and determining whether it is unambiguous, the grammatical construction, while not controlling, is an important aid.

5. "A statute is to be interpreted in the light of the nature of its subject matter, the purpose of the legislature in passing it, and the conditions and circumstances under which the law making body must have known it would operate; and, upon these considerations, it will not be so interpreted as to make it impose unreasonable burdens, greatly dis-

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proportionate to the resultant public benefit, unless its terms are so explicit and positive as to preclude any other construction." *State* v. *Baltimore & Ohio Railroad Co.*, 61 W. Va. 367, Pt. 2, Syl.

6. Chapter 10, Section 18, Acts of the Legislature, Regular Session, 1915, reenacted by Chapter 88, Section 13(h), Acts of the Legislature, Regular Session, 1925, and incorporated in the Official Code of 1931, in Chapter 22, Article 2, Section 10, evidences the legislative intent to prohibit the use of petroleum for motive power in the underground mines of this State as being inherently dangerous and deleterious to the miners working therein.

7. Code, 22-2-10, is clear and unambiguous, and should be applied so as to prohibit the use of petroleum as motive power in the underground mines of this State.

8. Code, 22-2-10, was enacted in the valid exercise of the police power of the State, which is inherent in the States of the Union, and was enacted with the evident purpose of protecting the health and safety of those engaged in mining in the underground mines of this State.

9. Code, 22-2-10, which prohibits the use of products of petroleum as motive power in underground mines in this State is not violative of the Fourteenth Amendment to the Constitution of the United States or the due process clause contained in Article III, Section 10, West Virginia Constitution.

Riley, Judge:

Pond Creek Pocahontas Company, a corporation, and National Mine Service Company, a corporation, instituted this proceeding in the Circuit Court of Kanawha County, against Arch J. Alexander, individually and as Chief of the Department of Mines of the State of West Virginia, Joseph J. Bierer, Acting Chief of the Department of Mines, E. L. Chatfield, inspector at large of the Department of Mines, and Elmer Farmer, mine inspector of the Department of Mines, for a declaratory judgment construing Section 18, Chapter 10, Acts of the Legislature, Regular Session, 1915, as reenacted by Section 13(h), Chapter 88, Acts of the Legislature, Regular Session, 1925, incorporated in

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the Official Code of West Virginia, 1931, as Chapter 22, Article 2, Section 10. The circuit court, having sustained a demurrer to the petition of Pond Creek Pocahontas Company and National Mine Service Company filed in that court, and by final decree having dismissed the petition, the petitioners prosecute their appeal in this Court.

The petitioner, Pond Creek Pocahontas Company, a mining company operating coal mines in McDowell County, West Virginia, and in Kentucky, purchased from its co-petitioner, National Mine Service Company, a manufacturer of mine equipment, having a place of business in Beckley, West Virginia, a ten-ton diesel haulage locomotive, designed for haulage purposes in the main haulways of the coal company's mine No. 6, near Bradshaw in McDowell County, powered by a product of petroleum. The use of this locomotive was approved by the Bureau of Mines of the United States Department of the Interior, subject to strict regulations and inhibitions contained and prescribed in Schedule 22, issued by that bureau. Following such approval, the Honorable Arch J. Alexander, then Chief of the Department of Mines of West Virginia, approved the use of the locomotive in the coal company's mine No. 6, located in McDowell County. Thereafter, by letter dated August 27, 1951, the Attorney General of this State, through the Honorable George W. Stokes, an Assistant Attorney General, advised the Chief of the Department of Mines that the use of the diesel locomotive contemplated by the coal company, violated Code, 22-2-10, in that it was proposed to be operated by the use of a product of petroleum. Alexander, by letter dated January 8, 1952, addressed to petitioner coal company at its office at Huntington, informed petitioner that he had personally examined and tested the locomotive at its location at mine No. 6, and, as a result of that examination, he was of opinion that the locomotive would not endanger the health or safety of miners working in petitioner's mine, and would not contaminate the air to such extent as to be injurious to the health of any miner working therein. He further stated that Elmer Farmer, mine inspector for the district in which petitioner's mines are located, and John Petty, electrical inspector, who were present at the time

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the examination and testing were done, joined in the mine department's opinion. This letter further informed petitioner coal company as follows:

"Accordingly, I not only refuse to approve the use of your locomotive, and others similar thereto, in your mines, when using as fuel a product of petroleum, but I hereby cancel and withdraw the approval which I have heretofore given you; and I am further compelled to advise you that if you use such locomotive so powered in any of your mines in this state, I will invoke and enforce against you the applicable provisions of the West Virginia Mine Laws and will cause to be closed the mine or mines in which the locomotive or others similar thereto may be so used, notwithstanding that I am of the opinion that the use of such locomotive so powered will not render the operation of your mine unsafe and will not contaminate the air in any such mine to such an extent as to be injurious to the health of any miner therein."

From the prayer of the petition it appears that the petitioners seek a declaratory judgment declaring: (1) That Section 10, Article 2, of Chapter 22, Code, 1931, does not prohibit the operation of the locomotive involved, and others similar thereto, in the underground mines of the petitioner coal company, where fueled by a product of petroleum "where the inspector is of the opinion that such use will not contaminate the air to such an extent as to be injurious to the health of the miner and is otherwise safe"; and (2) that, in so far as the statute prohibits absolutely and unconditionally the use of products of petroleum as fuel for underground locomotives in Pond Creek Pocahontas Company's mines, or in other underground mines in West Virginia, where such use is safe and reasonable, Section 10, Article 2, Chapter 22, Code, 1931, is unconstitutional and void as being in contravention of Section 10, Article III, West Virginia Constitution and the Fourteenth Amendment to the Constitution of the United States.

Section 18, Chapter 10, Acts of the Legislature, Regular Session, 1915, (now Code, 22-2-10), which was interpreted adversely to the petitioners by the circuit court, and is now before this Court for appraisal and consideration, reads:

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"No product of petroleum, or alcohol, or any compound that in the opinion of the inspector will contaminate the air to such an extent as to be injurious to the health of the miner shall be used as motive power in any mine."

The errors assigned in this Court are: (1) The trial court erred in sustaining defendants' demurrer to plaintiff's petition for a declaratory judgment; (2) the trial court erred in decreeing and declaring that the statute under appraisement unconditionally prohibits the use of diesel locomotives fueled by a product of petroleum as motive power in any coal mine in this State; (3) the trial court erred in decreeing and declaring that under the statute the Department of Mines of West Virginia has no authority to determine whether the use of a diesel locomotive fueled by a product of petroleum as motive power in any coal mine in this State will contaminate the mine to such extent as to be injurious to the health of the miners working therein; and (4) the court erred in decreeing and declaring that the statute under appraisement if construed as invoking an unconditional prohibition of the use of diesel locomotives, fueled by a product of petroleum as motive power in any coal mine in this State, is a reasonable exercise of the police power of the State, which does not contravene the Fourteenth Amendment to the Constitution of the United States and the due process clause contained in Section 10 of Article III of the Constitution of this State.

The record discloses that after the initial enactment of the statute diesel mine locomotives were developed for use in underground mines outside of the United States. It is suggested by counsel for Pond Creek Pocahontas Company and National Mine Service Company that such locomotives are approved for underground mines and are currently used in Great Britain, France, Germany, Belgium, Canada, and the Union of South Africa; and that in keeping with its policy of attempting to make coal mining in the United States safe and efficient, the Bureau of Mines of the United States Department of the Interior investigated the use of diesel mine locomotives in those countries, and on September 2, 1944, established and prescribed safety standards to be followed in the design, construction, and

use of diesel locomotives in underground mines. Petitioners' counsel urge that if the diesel locomotive involved in this proceeding is operated in accordance with the standards set forth in Schedule 22 of the bureau of mines, it can be operated in the coal company's mine No. 6 with perfect safety, although it is fueled by a product of petroleum; and that such locomotive would not contaminate the air in underground mines to such extent as to be injurious to the health of any miners working therein.

Stated succinctly, the issue between the parties to this controversy is as follows: It is the position of the petitioners, Pond Creek Pocahontas Company and National Mine Service Company, that Code, 22-2-10, should be read so that the words "that in the opinion of the inspector will contaminate the air to such an extent as to be injurious to the health of the miner shall be used as motive power in any mine", should modify the words "No product of petroleum, or alcohol, or any compound." It is the opinion of the attorney general that the above-quoted words should modify only the words "or any compound."

The basic and cardinal rule governing the interpretation of a statute is that the Court should ascertain and apply the legislative intent. *State* v. *Myers*, 74 W. Va. 488, 82 S. E. 270; *State* v. *Crawford*, 83 W. Va. 556, 98 S. E. 615; *State ex rel. Cosner* v. *See*, 129 W. Va. 722, 42, S. E. 2d 31; *Baird-Gatzmer Corp.* v. *Henry Clay Coal Mining Co.*, 131 W. Va. 793, 50 S. E. 2d 673; and *State ex rel. Holbert* v. *Robinson*, 134 W. Va. 524, 50 S. E. 2d 844.

In ascertaining the legislative intent, this Court should take into consideration the conditions and circumstances under which the Legislature must have known the statute would operate. *State* v. *Baltimore & Ohio Railroad Co.*, 61 W. Va. 317, 56 S. E. 518. And where the meaning of a statute is clear and its provisions unambiguous, this Court will not undertake to construe or interpret the statute, but the Court will, as it is its duty to do, apply the statute as its exact terms require. *State* v. *Epperly*, 135 W. Va. 377, 65 S. E. 2d 488; *Wilson* v. *Hix*, 136 W. Va. , 65 S E. 2d 717.

The grammatical structure of Code, 22-2-10, supports the

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interpretation of Section 10 advocated by the Attorney General. Section 10 is composed of a single sentence, the grammatical skeleton of which is: "product shall be used as power in mine". The subject of the sentence is the noun "product", which is modified by the word "No", and by three prepositional phrases, in the case of "petroleum" expressed, and in the cases of "alcohol" and "any compound" unexpressed. The noun "compound" alone is modified by the clause "that in the opinion of the inspector will contaminate the air to such an extent as to be injurious to the health of the miner." The noun "product" is the subject of the intransitive verb "shall be used", which verb is described by the phrase "as motive power in any mine."

Under this grammatical structure of Code, 22-2-10, Section 10 should be held to be read as the Attorney General contends: "No product *of* petroleum, or *of* alcohol, or *of* any compound that in the opinion of the inspector will contaminate the air to such an extent as to injure the health of the miner shall be used as motive power in any mine."

While the terms of a statute should not literally be applied so as to thwart the evident intent of the Legislature, and in any event statutory terms should be given a substantial meaning, *Bank of Weston* v. *Thomas*, 75 W. Va. 321, 83 S. E. 985; *Barnhart* v. *State Compensation Commissioner*, 128 W. Va. 29, 35 S. E. 2d 686; *State* v. *Hix*, 132 W. Va. 516, 54 S. E. 2d 198, we are of opinion that in this case the construction of the sentence contained in Section 10 is an important aid in determining whether the statute is unambiguous and as an aid in ascertaining the intent of the Legislature.

In determining the legislative intent in the enactment of Section 10, the conditions and circumstances under which the Legislature must have known that the statute would operate are of prime importance. In *State* v. *Baltimore & Ohio Railroad Co.*, 61 W. Va. 367, pt. 2 syl., 56 S. E. 518, this Court held: "A statute is to be interpreted in the light of the nature of its subject matter, the purpose of the legislature in passing it, and the conditions and circumstances under which the law making body must have known it would operate; and, upon these considerations, it will not be so

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interpreted as to make it impose unreasonable burdens, greatly disproportionate to the resultant public benefit, unless its terms are so explicit and positive as to preclude any other construction."

Section 10 was originally incorporated into the statutory law of this State by Chapter 10, Section 18, Acts of the Legislature, 1915; later in 1925 it was reenacted by Chapter 88, Section 13(h), Acts of the Legislature, 1925; and still later in 1931 Section 10, as it was originally drafted, was incorporated into the Official Code of 1931, in Chapter 22, Article 2, Section 10. This record clearly discloses that, at the times Section 10 was enacted and reenacted, diesel locomotives had not reached the high state of development and did not have the qualities of safety for haulage in underground mines suggested by the petitioners. We are, therefore, of the opinion that the Legislature intended to prohibit the use of petroleum as motive power in underground mines as being inherently dangerous and deleterious to the health and safety of the miners working therein.

Section 10 being, in our opinion, clear and unambiguous, viewed in the light of the circumstances at the times of its enactment and reenactment, together with the technical construction of the sentence comprising Section 10, should be applied under *State* v. *Epperly, supra,* and *Wilson* v. *Hix, supra,* so as to prohibit the use of petroleum as motive power in underground mines in this State.

Petitioners contend that Section 10, if construed as invoking an absolute prohibition against petroleum as motive power in underground mines, would be unconstitutional as being violative of the Fourteenth Amendment to the Constitution of the United States, and the due process clause contained in Article III, Section 10, of West Virginia Constitution. That the mining of coal or other minerals in underground mines is inherently dangerous cannot be gainsaid. Section 10, in our opinion, is a valid exercise of the police power, which is inherent in the States of the Union. It was enacted with the evident purpose of protecting the health and safety of those engaged in mining in underground mines in this State. The legislative fiat contained in Section 10 is, in our opinion, not arbitrary and unrea-

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sonable, in the light of the circumstances prevailing at the times it was originally enacted and later reenacted.

Petitioners' only relief lies with the Legislature of this State. It is interesting to note that the Legislature has prescribed safety standards for the use of electric power for motive purposes in underground mines and also for the use of kerosene and oil by coal miners in their lamps. Code, Chapter 22, Article 2.

It is also well to note that the statute of Pennsylvania, which is identical with Code, 22-2-10, except that the Pennsylvania statute, as originally enacted, had no comma after the word "petroleum" but had a comma after the word "miner", was amended in 1937 by the enactment of Section 1020, Chapter 4, Title 52, Purdon's Pennsylvania Statutes, Anno., Perm. Ed., as follows: "No product of petroleum or alcohol, or any compound thereof shall be used, as motive power in any mine, without the written consent of the inspector, which written consent shall state the conditions under which it may be used as a motive fuel."

The decree of the Circuit Court of Kanawha County is affirmed.

Affirmed.

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No. 144. POND CREEK POCAHONTAS CO. ET AL. *v.* ALEXANDER, CHIEF OF THE DEPARTMENT OF MINES OF WEST VIRGINIA, ET AL. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:* Bierer, present Chief of the Department of Mines of West Virginia, substituted as a party appellee for Alexander. The appeal is dismissed for the want of a substantial federal question. *Don Rose* for appellants. Reported below: 137 W. Va. 864, 74 S. E. 2d 590.

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